UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

NAVOPACHE ELECTRIC COOPERATIVE, INC.

and **Case 28–CA–160585**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 387, AFL–CIO

Cristobal A. Munoz, Esq., for the General Counsel.
Michael J. Keenan, Esq., (Ward, Keenan & Barrett, P.C.), for the Charging Party.
John Alan Doran, Esq., (Sherman and Howard L.L.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on July 6, 2016, in Phoenix, Arizona. The International Brotherhood of Electrical Workers, Local Union No. 387 (the Union) filed a charge on September 22, 2015, alleging a violation by Navopache Electrical Cooperative, Inc., (the Respondent "NEC"), of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed an answer on May 10, 2016 and an Amended Answer on May 12, 2016, denying that it violated the Act.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations here. I have studied the whole record, and based upon the detailed findings and analysis below, I conclude that the Respondent violated the Act as alleged.

FINDINGS OF FACT

i. jurisdiction

The complaint alleges, Respondent admits and I find that:

1. At all material times, Respondent has been a nonprofit member-owned electricity distribution cooperative with an office and place of business in Lakeside, Arizona (Respondent's facility), and has been engaged in providing electrical services to its members.

(a) In conducting its operations during the 12-month period ending September 22, 2015, Respondent performed services valued in excess of $50,000 directly from points outside the State of Arizona.

(b) In conducting its operations during the 12-month period ending September 22, 2015, Respondent derived gross revenues in excess of $250,000.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(d) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

2. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Chuck Moore – Chief Executive officer
Natalie Stobs – Manager of Human Resources

ii. Alleged Unfair Labor Practices

Background

Respondent ("NEC") provides electrical services to its members over a 10,000 square mile service area. Its headquarters are located in Lakeside Arizona and it maintains area offices in Heber-Overgaard, White River, Saint Johns and Springerville, Arizona. In addition, Respondent maintains an area office in Reserve, New Mexico. Respondent divides its operations into eight districts, seven of which are located in Arizona and one in New Mexico. Respondent oversees its operations through a Board of Directors. The NEC Board is comprised of eight individuals who are elected by cooperative members in each district. Although the NEC Board maintains an oversight role, the day to day management of operations are delegated to the Chief Executive Officer. Respondent, at the time of the hearing, employed a total of 100 employees. Approximately 95 percent of the employees are also "cooperative members" who are defined as persons who purchase electricity from Respondent. Of the 100 employees, 65 are represented by the Union and 35 are not. The Board regularly meets each month to discuss matters pertaining to the provision of electrical service and quarterly to discuss matters such as

finances or audits. All of the NEC Board meetings, which generally last from, 9 a.m. to 4 p.m., are bifurcated into a session where the Board meets in private and a two hour "call to members" session in which cooperative members may participate.

A. The Union and Respondent's Relationship

Respondent has recognized the Union as the exclusive collective-bargaining representative (R. Exh. 4). The current collective-bargaining agreement is effective from November 1, 2015 to November 1, 2018. (GC Ex. 4). Prior to the current agreement, the Union and Respondent were parties to a collective-bargaining agreement that covered the time frame from November 1, 2012 to November 1, 2015.

B. Respondent's Personnel/Board Relationship Policy #E.520

Respondent maintains Board Policies that apply to all of Respondents' employees regardless of whether they are represented by the Union or not. As part of the onboarding process, all new employees receive, and acknowledge receipt by their signature, a copy of Respondent's policies which include Policy #E.250. The Policy contains the following language:

> Purpose
>
> To define personnel/Board relationship.
>
> Provisions
>
> 1. The Board of Directors employs the General Manager. The General Manager is expected to be present at Board meetings. Department Managers or employees presenting reports, etc., at Board meetings do so at the direction and call of the General Manager.
>
> 2. All employees are to understand that they, ultimately, report to the General Manager and do not have access to the Board of Directors at regular or special meetings of the Board on personnel matters.
>
> 3. Most employees are members of NEC. Should there be issues as a member, not related to personnel matters, then employees have the same access to visit with the Board of Directors as any member of NEC.

Analysis

In order to determine whether a work rule violates NLRA Section 8(a)(1), the Board considers "whether the rule would reasonably tend to chill employees in the exercise of their statutory rights." *Lafayette Park Hotel*, 326 NLRB 824, (1998) enfd. 203 F.3d 52 (D.C. Cir. 1999). In making this assessment, the Board engages in a two-step inquiry. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). First, the Board examines whether the rule "explicitly

restricts" Section 7 activity; if it does, the rule violates the Act. But if nothing in the rule explicitly restricts Section 7 activity, then the Board moves to the second step, under which the rule violates the Act if it satisfies any one of the following three conditions: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union or other Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." The mere maintenance of a rule likely to chill Section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice "even absent evidence of enforcement." *Community Hospitals. of Central California v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) (citing the Board's "mere maintenance" rule). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Lafayette Park* at 825, 827. To the extent that a work rule may be subject to competing interpretations, any ambiguity is construed against the employer who promulgated it. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

In this case, the General Counsel argued that the policy in question is unlawful because it explicitly restricts Section 7 activity and on its face violates the Act. Alternatively, the General Counsel argued that the policy is unlawful because employees would reasonably construe the language in the policy to prohibit Section 7 activities. Respondent asserts that the rule does not explicitly restrict Section 7 activity and is "narrowly tailored." I disagree with Respondent's characterization of the rule. The rule mandates that employees "do not have access to the Board of Directors on personnel matters." A reasonable reading of the rule evidences a direct prohibition against employees addressing any and all terms and conditions of employment with the Board of Directors which fall under the umbrella of "personnel matters." The prohibition is further emphasized and clarified by the third paragraph of the rule which makes clear that employees can discuss "member" issues "not related to personnel matters" with the Board. Undoubtedly, the rule is directed at "employees'" and the use of the term "personnel matters" is all encompassing and covers the entire spectrum of terms and conditions of employment. Issues regarding wages, and benefits clearly fall under the umbrella of "personnel matters" Well-settled Board law makes clear that discussions regarding wages are core Section 7 rights. *Parexel International*, 356 NLRB 516, 518 (2011). Thus, I find that the rule explicitly restricts Section 7 activity and is unlawful under the standards set forth in *Lutheran Heritage Village-Livonia*.

Assuming for the sake of argument that the rule did not explicitly restrict Section 7 activity, given the breadth of the rule, the prohibition could be reasonably interpreted by an employee or a group of employees to preclude discussions of any and all terms and conditions of employment including the discussion of wages or benefits with the NEC Board of Directors. Furthermore, the Board has specifically and repeatedly held that attempts to restrict employees' Section 7 rights to appeal to an employer's leadership are unlawful. See *Hyundai America Shipping Agency*, 357 NLRB 860, 860, 871 (2011) (handbook rule requiring employees to "[v]oice your complaints directly to your immediate superior or to Human Resources. . ." was unlawful), enf. denied 805 F.3d 309 (D.C. Cir. 2015); *American Federation of Teachers New Mexico*, 360 NLRB No. 59 (2014) (unlawful rule prohibited "AFT-NM employees from engaging in internal politics of AFT-NM, its locals, or AFT, including lobbying executive council members on items likely to come before them, including personnel matters"). It is worth noting that the Board has also found attempts to restrict communication to a single person in a leadership position unlawful. See *Michigan State Employees Ass'n d/b/a Am. Federation of*

State County 5 Mi Loc Michigan State Employees Ass'n, 364 NLRB No. 65 (2016). The Board's holdings and its rationale in both *Hyundai* and *American Federation of Teachers* when applied against the backdrop of the facts of this case makes clear that NEC's attempt to restrict employees communication with the NEC Board of Director's is unlawful.

Equally unavailing is Respondent's contention that employees' Section 7 rights are outweighed by Respondent's legitimate business interests "to conduct its business effectively and efficiently." In this vein, Respondent implicitly advocates that the proper test when applying *Lutheran Heritage Village-Livonia* involves a balancing of the NEC's legitimate interests against the Section 7 rights of employees. The Board and the courts have repeatedly openly rejected this approach. See *William Beaumont Hospital,* 363 NLRB No. 162 (2016) (holding that the standard applied in *Lutheran Heritage Village-Livonia* as it exists takes into account employer interests); see also *NLRB v. Northeastern Land Services. Ltd*., 645 F.3d 475, 483 (1st Cir. 2011) (rejecting outright the application of a balancing test finding, "while the Board could have chosen to structure its rule differently to engage in a balancing analysis, we owe deference to its decision not to do so."). Moreover, as a practical matter any legitimate interest Respondent may have regarding "business efficiency" can be addressed with a narrowly tailored rule that doesn't unlawfully interfere with employees' Section 7 rights. See *William Beaumont Hospital*, *Id.* slip op. at p. 2 (noting that "where the Board finds a rule unlawfully overbroad, the employer is free to adopt a more narrowly tailored rule that does not infringe on Section 7 rights). See also, *Cintas Corp. v. NLRB*, 482 F.3d 463, 470 (D.C. Cir. 2007).

Respondent's Defenses

A. The Complaint is Not Barred by Section 10 (b) of the Act

Respondent asserts that the policy was created on March 21, 1995 and modified January 15, 2003, and in 2012, NEC and the Union discussed the policy but the Union did nothing until it filed its charge on September 22, 2015. Respondent therefore citing 29 U.S.C. Section 160(b) asserts that the complaint should be barred because "Charging Parties do not allege a single instance of actionable conduct occurring within the 6 month statute of limitations period." (R. Br. at 16). I disagree. There is no dispute that Respondent's policy was in effect at the time the charge was filed and has been in effect in its present form since 2003. The charge on its face alleged "during the last 6 months and on a continuous basis" the employer maintained an overly broad policy. (GC Ex. 1a). The Board has repeatedly held that the maintenance of an unlawful rule is a continuing violation under the Act and therefore will not be barred if the rule was promulgated outside of the 6-month time frame for filing and service of a charge. *Kmart Corp.*, 363 NLRB No. 66, slip op. at 1 fn. 2 (2015); *PJ Cheese, Inc*., 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 fn. 7 (2015). It is the maintenance of the rule that renders it unlawful regardless of whether Respondent took particular actions to enforce the rule. *TeleTech Holdings, Inc*., 333 NLRB 402, 403 (2001); *Alaska Pulp Corp*., 300 NLRB 232, 233–234 (1990). enfd. 972 F.2d 1341 (9th Cir. 1992). Accordingly, I find the complaint is not time-barred under Section 10(b) of the Act.

B. Deferral Is Not Appropriate

Respondent asserts that the matter is covered by the grievance and arbitration provisions of the CBA and, therefore, the matter should be deferred pursuant to the principles set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971). In support of its position, Respondent argues *inter alia* that the parties have a long and productive bargaining relationship, the CBA broadly defines "grievance" as "any complaint on the part of an employee or employees …regarding dissatisfaction with working conditions or any action on the part of the Cooperative which is believed to be in violation of the agreement;" Respondent has asserted a willingness to resolve the dispute through arbitration, and suggests that the matter is well suited for arbitration. (R. Exh. 4, R. Br. at 18). I am not persuaded by Respondent's assertions that deferral is appropriate. It is undisputed that the policy at issue applies to all employees and that many of the employees who work for Respondent are not represented by the Union, have no access to the grievance procedures, and are not covered by the CBA. In view of these undisputed facts, I find deferral inappropriate. Furthermore, deferral is appropriate only if an arbitrator is specifically authorized to decide the alleged unfair labor practice at issue. See *Babcock & Wilcox Construction Co*., 361 NLRB No. 132 (2014)(holding that arbitration is a consensual matter and noting that the Supreme court has expressly held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." See *Steelworkers of America v. Warrior & Gulf Nav. Co*. 363 U.S. 574, 582 (1960). In this case, the policy at issue was not negotiated by the Union, the CBA does not mention the policy and there is no express language in the CBA which would otherwise purport to authorize an arbitrator to decide this specific issue.

*C. **The Charge is Not Barred by Section 8b(1)(B) of the Act***

Respondent argues that "Charging Party is utilizing an argument under *Lutheran* as a "Trojan horse" to access the (NEC) Board of Directors and circumvent the bargaining representative and Article VII of the CBA." (R. Br. at 25). There is no evidence in the record to support this speculative notion. Respondent's suggestion that employees voicing concerns directly to the NEC Board will erode the ability of the bargaining representatives to perform their duties neglects the simple fact that the NEC Board presumably has the authority to directly address any attempts to circumvent the ordinary bargaining representative processes. Also as previously noted, approximately one third of NEC's employees that are covered by the policy in issue are not represented by the Union; therefore, Respondent's argument that the charge is somehow barred by Section 8b(1)(B) lacks any logical or legal foundation of applicability to these employees. For those employees that fall within the ambit of the CBA, there is no clear indication that the Union clearly and unmistakably waived employees' rights to appeal directly to the NEC Board regarding all "personnel matters." *Johnson-Bateman Co*., 295 NLRB 180, 189 (1989). More importantly, the breadth of employees Section 7 right's encompass more than what the bargaining representatives may on occasion choose to discuss or not to discuss. See for example, *Universal Fuels*, 298 NLRB 254 (1990) (holding employees should be free to voice their views concerning what a contract grants them as to pay and benefits regardless of whether or not their union and their employer take a different view).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a)(1) by:

(a) Since January 15, 2003, promulgating and maintaining overly broad rules described as Policy #E5.270 prohibiting employees from discussing terms and conditions of employment with the Navopache Electric Cooperative, Inc.'s Board of Director's.

3. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Navopache Electric Cooperative, Inc., Lakeside, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Promulgating and maintaining overly broad rules that prohibit or may be reasonably read to prohibit employees from exercising their Section 7 rights to communicate individually or collectively, formally or informally with Navopache Electric Cooperative Inc. Board members regarding matters pertaining to terms and conditions of employment and encompassed within rights guaranteed under Section 7.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overly broad rules which prohibit employees from exercising their Section 7 rights to communicate individually or collectively, formally or informally with Navopache Electric Cooperative Inc. Board members and notify all employees that such rules have been rescinded.

(b) Rescind and remove the overly broad rules which prohibit employees from exercising their Section 7 rights.

(c) Furnish all current employees at all of its locations with inserts for the Board Policies that (a) advise that the unlawful policy has been rescinded, or (b) provide the language of a lawful policy; or (2) publish and distribute revised Board Policies to all current employees at all of its locations that (a) do not contain the unlawful policy, or (b) provide the language of a lawful policy.

(d) Within 14 days after service by the Region, post at its facility in Lakeside Arizona, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 6, 2017

Dickie Montemayor
Administrative Law Judge

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union;**
- **Choose a representative to bargain with us on your behalf;**
- **Act together with other employees for your benefit and protection;**
- **Choose not to engage in any of these protected activities.**

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain rules or policies that you would reasonably understand to prohibit you from exercising your right to act together with your coworkers to appeal to our Board of Directors about matters related to your wages, hours, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind and cease maintaining or enforcing our Personnel/Board Relationship Policy #E5.270, and WE WILL furnish all current employees with inserts for their Board Policies that (1) advise employees that the policy has been rescinded or (2) provide the language of a lawful policy; or publish and distribute revised Board Policies that (1) do not contain the policy or (2) provide the language of a lawful policy.

NAVOPACHE ELECTRIC COOPERATIVE, INC.
(Employer)

Dated:_____ By:_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the board's toll-free number 1–866–667–NLRB (1–866–667–6572). Hearing impaired persons may contact the agency's TTY service. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue Suite 1400
Phoenix, AZ 85004
Telephone: (602)640–2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-160585 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 416-4755